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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 140

UNITED STATES OF AMERICA, *Petitioner,*

v.

WILLIAM ROSEN, *Respondent.*

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

The respondent, William Rosen, submits this brief in opposition to the prayer of the United States that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit upholding respondent's invocation of his constitutional privilege against self-incrimination.

Statement

The Government's recital of the facts (Govt's. Brief, pp. 5-11) should be read in conjunction with the recital of the facts in the opinion of the Court of Appeals (R. 71-76). It should be noted that not only did the respondent under oath declare his belief that the answers to the questions

would incriminate him (R. 40-41), but three judges of the Court of Appeals were also of the view that under the circumstances his belief was justified (R. 69-76).

The Government's request that this Court determine whether the danger of self-incrimination was "sufficiently real and substantial" (Govt's. Brief, p. 2) appears to disregard, it is respectfully submitted, the mandate of the Constitution binding upon this Court (*Counselman* v. *Hitchcock*, 142 U. S. 547), as well as the applicable law and facts involved herein.

This Court has held, on numerous occasions, that the constitutional privilege against self-incrimination must be liberally construed in order to give fullest effect to the immunity. To make the privilege available, it is not necessary that the witness show that the testimony which he declines to give is certain to subject him to prosecution, or that it will prove the whole crime, unaided by testimony of others. It is enough to wake the privilege into life that there is a possibility of prosecution, and that the testimony, although falling short of proving the crime in its entirety, will tend to a conviction when combined with proof of other circumstances which others may supply. A witness cannot be compelled to disclose any fact which forms a link in a chain of testimony that would be sufficient to convict him of any crime (*Counselman* v. *Hitchcock*, 142 U. S. 547; *Brown* v. *Walker*, 161 U. S. 591; *Ballman* v. *Fagin*, 200 U. S. 186; *Arndstein* v. *McCarthy*, 254 U. S. 71).

The evidence produced by the respondent in this proceeding (Exhibit A, "Indictment United States v. Alger Hiss" (R. 63-65); Exhibit B, "Hearings Regarding Communist Espionage In The United States Government", 80th Cong., 2d Sess., 1948 (R. 68); Exhibit entitled "Soviet Espionage Within The United States Government, December 31, 1948" (R. 68); Exhibit entitled "Report of the Committee on Un-American Activities", December 31, 1948 (R. 68); Exhibit C (R. 66-67), (Times Herald, September 4, 1948) amply demonstrated substantial reasons on the part of the respondent for invoking his constitutional privilege.

We do not detail all of the testimony here. In summary, all of the interrogations directed to the respondent were intended to compel from him answers concerning the transfer of a certain motor vehicle on July 23, 1936, from one Alger Hiss to the Cherner Motor Company of Washington, D. C., and on the same day, from the Cherner Motor Company to one William Rosen. The respondent refused to answer questions concerning this transaction upon the ground that the answers would compel him to testify against himself.

In August of 1948, one Whittaker Chambers testified before the House Committee on Un-American Activities concerning alleged "Communist espionage in the United States Government" (Exhibit B, pp. 563-586, 661-673, 1078-1110, 1176-1206, 1255-1266, 1271, 1278-1290). A few days before, one Elizabeth Terrill Bentley testified before the same Committee (Exhibit B, pp. 503-562, 604-611, 687-692). Summarizing their testimony in a report of December 31, 1948 (Exhibit entitled, "Report of the Committee on Un-American Activities"), the House Committee declared that the testimony of these two witnesses "revealed for the first time the pattern of this espionage apparatus operating through small, conspirative groups of about five individuals, and consisting of Government employees stationed in top-flight posts. These groups sometimes do not know of each other's existence. Their contact with the Soviet military intelligence is maintained through a single individual known only by an alias" (Report, supra, p. 15). In another report issued the same day (Exhibit entitled, "Soviet Espionage Within The United States Government"), the House Committee was of the opinion that the conspiracy was in existence "as late as 1945" (supra, p. 9) and "we have no evidence to indicate that the operations of this second apparatus do not continue to the present time" (supra, p. 9). Testifying concerning the alleged participation of Alger Hiss in this conspiracy, Chambers charged that Hiss, while a part of the conspiracy, had turned his car over to a Communist

organizer in Washington, D. C., on July 23, 1936 (Exhibit B, pp. 666, 1183), for use of the Communist Party, against the advice of Chambers and one Peters, "the head of the entire underground" (Exhibit B, p. 662). Chambers also testified that not only was there a Communist conspiracy to commit espionage, but that "the Communist Party exists for the specific purpose of overthrowing the Government, at the opportune time, by any and all means; and each of its members, by the fact that he is a member, is dedicated to this purpose" (Exhibit B, p. 565).

In this context of charges of alleged conspiracy to commit espionage and forcible overthrow of the Government, Louis J. Russell, an investigator employed by the House Committee on Un-American Activities, testified that on July 23, 1936, Alger Hiss, as the Motor Vehicle Bureau records revealed, had transferred his motor vehicle to the Cherner Motor Co., and on the same day, the vehicle was sold to William Rosen, of Washington, D. C. (Exhibit B, pp. 1111-1112). The officials of the Cherner Motor Company testified that they had no record of the particular transaction (pp. 1052-1074, 1111-1115), although records were kept of all transactions (Exhibit B, p. 1065). The officials of the Company and the members of the House Committee termed the transaction "an unusual case" (Exhibit B, p. 1114).

Thus, the respondent here was faced, at the time when the interrogations concerning the motor vehicle were directed to him, with the charges of the House Committee on Un-American Activities and its sponsored witnesses that there existed an alleged continuing Communist conspiracy to commit espionage and forcible overthrow of the Government, that Alger Hiss had been part of this secret Communist conspiracy, and while engaged in such conspiracy with other Communists in small conspiratorial groups tied together by unnamed individuals, he, Hiss, had transferred his motor vehicle to a William Rosen, allegedly a member of the Communist Party in Washington, D. C., through a peculiar and questionable transaction, for use of the Communist Party. (See the analysis

of the evidence in the opinion of the Court of Appeals, R. 69-76.) Moreover, during the hearings, a leading newspaper in Washington, D. C., linked the respondent with the Russian secret police (Exhibit C, R. 66-67). On December 16, 1948, the indictment returned in the Southern District of New York against Alger Hiss (R. 63-65) indicated the strong reliance of the Government upon the testimony of Whittaker Chambers, and the indictment itself reveals that the transfer of the motor vehicle was the subject of inquiry by the Grand Jury which returned the indictment (R. 64). All of this faced the respondent when the questions here were propounded to him. It is submitted that under such circumstances the respondent made more than ample showing to justify his invocation of the privilege against self-incrimination. "In any event, if the fact that the witness is in danger appears, great latitude should be allowed to him in judging for himself of the effect of any particular question" (58 American Jurisprudence, Section 82, p. 72).

The Government's view that the respondent was not entitled to invoke the privilege because "no charge was ever made that the automobile had been utilized in or associated with any criminal activity" (Govt's. Brief, p. 16), and the assumption that if answers had been made in the affirmative or in the negative, the danger of incrimination would have been "nebulous" (Govt's. Brief, pp. 16-17), appears to overlook the record, the applicable decisions of this Court, and the Constitution. The charges levelled by the Government and its witnesses were that a broad conspiracy to commit serious offenses existed. The testimony sought from the respondent, if the charges made by the Government were true, would clearly be cogent evidence against him in any subsequent conspiracy prosecution. That the danger of prosecution exists is evidenced in the Report of the House Committee on Soviet Espionage: "• • • we are convinced that by diligently pursuing its activities on this case our committee, if aided by equally diligent activities by the Department of Justice, will secure further indictments or confessions in connection with these

espionage activities" (p. 11). The use of conspiracy statutes by prosecutions where substantive offenses have been difficult to prove has been noted by the Courts (*Matter of Doyle*, 257 N. Y. 244, 253. See also *Kotteokos* v. *United States*, 328 U. S. 750, 772). Moreover, it is the belief *of the witness* that his answers will incriminate him which determines the issue—once a showing is made of the danger of incrimination—and not the assertion by the Government that there is no cause for alarm (*Counselman* v. *Hitchcock*, 142 U. S. 547).

The intimation by the Government that the offenses may be barred by the statute of limitations (Govt's. Brief, p. 15) is without merit. The charge here is of a continuing conspiracy, unaffected by any limitation till the combination is abandoned (*United States* v. *Kissel*, 218 U. S. 601; See also, *Matter of Doyle*, 257 N. Y. 244, 256 (Cardozo, J.)).

Conclusion

It is respectfully submitted that the petition for a writ of certiorari should be denied. No reason has been asserted within the purview of the rules of this Court (Rule 38(5)(b)) for the exercise of this Court's discretion. The suggestion of "a pattern of resistance" (Govt's. Brief p. 18) is without foundation in the record. Ample evidence does exist, as pending and decided cases before this Court as well as other Courts indicate, that a pattern of arbitrary action by officials of government threaten seriously the civil liberties of the ordinary citizen. The respondent here has exercised a right which the fundamental law guarantees him as a protection against the excesses of government. His position has been sustained by the unanimous decision of the Court below.

Respectfully submitted,

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